LIBRARY
SUPREME COURT, U. S.

No. 1234

FILED
APR 15 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

HO YEH SZE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1234

HO YEH SZE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a deportation hearing before a Special Inquiry Officer, petitioner was found deportable as a non-immigrant crewman who had overstayed the authorized period of his admission to the United States (8 U.S.C. 1251(a)(2)). Petitioner, who was represented by counsel, conceded that he was deportable but requested the privilege of voluntary departure. His counsel informed the Inquiry Officer that petitioner did not wish to exercise his right to select a country of deportation (see 8 U.S.C. 1253(a) set forth at Pet. 2-3).

The officer asked whether there would be any application under Section 243(h)[1] if petitioner were ordered deported to Formosa, the country of his nationality, and counsel indicated that there would be none. The officer then inquired of the government whether it sought to have the deportation order provide an alternative country of deportation in the event that it should be determined that deportation to Formosa could not be effectuated (see 8 U.S.C. 1253(a) set forth at Pet. 2-3). The government suggested Hong Kong, since petitioner previously resided there and had last entered the United States from there (see 8 U.S.C. 1253(a)(1), (2), and (5), set forth at Pet. 3). Petitioner's counsel then asserted that the order to show cause was defective because the government had been aware prior to the hearing that it would seek to have Hong Kong designated as an alternate country of deportation but had not indicated its intention to do so in the order to show cause which had been mailed to petitioner. The Special Inquiry Officer held the order to show cause to be valid, but offered petitioner's counsel a continuance for purposes of presenting any contention he might wish to make regarding the propriety of designating Hong Kong as an alternate country of deportation. Counsel declined the offer. The officer then granted petitioner's request for voluntary departure but ordered that should petitioner not depart as required he should be deported to Formosa and, if Formosa proved unwilling to ac-

[1] This section authorizes the Attorney General to withhold deportation to any country in whch an alien would be subject to persecution on grounds of race, religion or political opinion.

cept him, to Hong Kong.[2] An appeal by petitioner to the Board of Immigration Appeals, on the ground that the order to show cause was defective for failing to name the alternative country of deportation, was dismissed (R. 9-13).[3] On petition for review, the court of appeals affirmed (Pet. 11-16).

There is nothing in the statutory and regulatory scheme governing deportation hearings to support petitioner's argument that the order to show cause must state the country to which the government will seek to deport the alien. The function of the order to show cause is to give the alien notice of the grounds on which the government will seek to have him deported. Congress has provided that deportation proceedings involving aliens shall be conducted in accordance with regulations prescribed by the Attorney General which must include, *inter alia*, "notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held." 8 U.S.C. 1252 (b)(1). A regulation (8 C.F.R. 242.1) provides that deportation proceedings will be commenced by order to show cause, which shall "contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the

---

[2] The above facts are taken from the opinion of the court of appeals and the decision of the Special Inquiry Officer, the latter set forth at pages 1-5 of the administrative record lodged with the Clerk of this Court.

[3] "R." refers to the record in the court of appeals, on file with the Clerk of this Court.

acts * * * alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated." Since the country of deportation is not a part of the charge against an alien it need not be set forth in the order to show cause. Accepting the analogy suggested by petitioner to criminal proceedings, the function of an order to show cause is similar to that of an indictment or information. Just as the possible penalty is not part of the criminal charge, so the possible country of deportation is no part of the deportation charge.

When an alien is ordered deported, Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), specifies that deportation must be to the country designated by the alien, if it is willing to accept him, and, if not, to the country of his nationality. If neither of those countries will accept the alien, the Attorney General has complete discretion to order him deported to any other country which qualifies under one of the specific statutory standards. Since the question of an alternative country of deportation only arises when there is a possibility that either the country of the alien's choice or nationality will not accept him, there is no reason why that matter should be determined before the order to show cause is issued. If the alien is found deportable, he may designate a country which is known to be willing to accept him, or it may be known that the country of his nationality will accept him. In such situations, there would then be no need for an alternative designation.

Where an alternative designation is suggested by the Service, due process is satisfied by giving the alien an opportunity to present such evidence, as he may wish, to contest the alternative designation. In this case, the Special Inquiry Officer offered to adjourn the hearing so that petitioner could, if he wished, contest the designation of Hong Kong. Petitioner was entitled to no more. Indeed, in these circumstances, it is difficult to see how he was in any way disadvantaged by the lack of prior notification.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

APRIL 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 296209 703